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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12 Cr. 938 (SHS)

5 XIA PING WEN,

6 Defendant.

7 -----x
8 January 16, 2014
9 3:15 p.m.

10 Before:

11 HON. SIDNEY H. STEIN

District Judge

12
13 APPEARANCES

14 PREET BHARARA

United States Attorney for the
Southern District of New York

15 BY: REBECCA MERMELSTEIN

16 Assistant United States Attorney

17 COLLEEN BRADY

Attorney for Defendant

18 ALSO PRESENT: CHRISTOPHER DEGRAFF, F.B.I.

19 NANCY WU, Chinese Interpreter

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(Case called)

(In open court)

MS. MERMELSTEIN: Good afternoon, your Honor. Rebecca Mermelstein for the government. With me is Special Agent Chris Degraff.

THE COURT: Good afternoon.

MS. BRADY: Good afternoon, your Honor. Colleen Brady for Ms. Wen.

THE COURT: Good afternoon. Swear the interpreter.

(Interpreter sworn)

THE INTERPRETER: My name is Nancy Wu, W-u. Good afternoon.

THE COURT: Good afternoon, Ms. Wu. Please be seated. We're here for the sentencing of Ms. Wen. I have the following information. I have the presentence report prepared on August 9, 2010, along with the addendum approved on September 12 -- or, I'm sorry. Did I say 2010? August 9, 2013 -- along with the addendum approved on September 12, 2013, and the sentencing recommendation approved on the same day. In addition, I have a submission dated December 30, 2013 from Ms. Brady to the probation officer, and I have the memorandum in aid of sentencing on behalf of the defendant received in chambers on January 6th of this year, along with an extensive number of letters in support of the defendant. I read all of the letters and indeed all of this information, and I have considered all

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1 of it. I also have the sentencing memorandum of the government
2 filed on January 10.

3 Ms. Brady, is there any additional information I
4 should have?

5 MS. BRADY: Your Honor, just for the court's
6 information, I had not heard from Mr. Johnson, the probation
7 officer, about my objections and clarifications, so I e-mailed
8 him this morning, and he had never received the copy I mailed
9 to him. I then e-mailed my objections and clarifications to
10 him. He said he would make some of the recommendations but he
11 was going to stand by his sentencing guidelines recommendation
12 for sentence. He suggested that I ask the court for a short
13 adjournment today, and I said I didn't think that was a wise
14 idea given the logistics of everything. So, I just wanted to
15 make the court aware of that conversation this morning.

16 THE COURT: Well, I gather what you have told me is
17 that you faxed this, or sent in some way, this December 30
18 letter to the probation officer today.

19 MS. BRADY: I mailed it.

20 THE COURT: No, I understand, but he didn't receive
21 it.

22 MS. BRADY: He didn't receive it.

23 THE COURT: What is it you are asking me to do, if
24 anything?

25 MS. BRADY: He indicated that he was going to make

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1 some of the adjustments.

2 THE COURT: Well, I can't adopt the findings of fact
3 in the presentence report if you are going to tell me that the
4 probation office is going to recommend that it be altered.

5 MS. BRADY: Well, I guess --

6 THE COURT: What you can do now, if you wish, is raise
7 any objections you wish to raise here, and I will deal with
8 them here now, if that's what you want.

9 MS. BRADY: All right.

10 THE COURT: Let's go back to my original question.
11 Was there any additional information I should have apart from
12 the information that I identified?

13 MS. BRADY: No, your Honor.

14 THE COURT: All right. Government?

15 MS. MERMELSTEIN: No, your Honor.

16 THE COURT: Now, Ms. Brady, have you had a full
17 opportunity to discuss all of this information with your
18 client, and have you in fact discussed it all with your client?

19 MS. BRADY: I have, your Honor, at length and with an
20 interpreter at each occasion.

21 THE COURT: All right. Now, what points do you wish
22 to raise now in regard to the presentence report, if any?

23 MS. BRADY: In part A of the PSR, paragraph 2, Ms. Wen
24 coached asylum applicants by way of providing questions that
25 typically would be asked during their asylum hearings. An

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1 example of these questions on the topic of family planning is
2 attached as Exhibit A. I also included it in my sentencing
3 submission to the court.

4 On paragraph 12 --

5 THE COURT: I'm sorry. What would you like me to do?
6 What are you asking the court to do in regard to that paragraph
7 2?

8 MS. BRADY: I'm asking to substitute my language for
9 the one that's in the current report.

10 THE COURT: Well, those are two different things. The
11 way it now reads it says that she coached other people to lie
12 during interviews. And what you have says that she provided
13 questions that would typically be asked. I take it the latter
14 is your position as to what happened.

15 Government, do you have a position on that?

16 MS. MERMELSTEIN: Yes, your Honor. I think the PSR
17 should remain as it is. That's the language from the
18 indictment that the defendant pled guilty to, but notably I'm
19 not sure that coaching an asylum applicant on what to expect in
20 an asylum interview would even be a crime. The crime is that
21 she prepared them to lie in their interviews by helping them to
22 prepare for how to provide answers that were not true. So, I
23 think --

24 THE COURT: Well, I have some question based on the
25 allocution which was taken before Magistrate Judge Gorenstein

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1 and which I have adopted. It wasn't entirely a hundred percent
2 clear as to what she was allocuting to. I'm quite comfortable
3 that the allocution covered the elements of the crime, and it
4 was appropriately sent to me on recommendation by Judge
5 Gorenstein, and it was appropriately adopted, but I do have
6 some questions as to exactly what she did.

7 You are saying that she gave -- proposed false answers
8 to interviewee applicants during interviews?

9 MS. MERMELSTEIN: Not during the interviews, your
10 Honor. Applicants would sort of memorize the fake story that
11 they were going to present to the asylum officer. This
12 defendant would meet with applicants in advance of their
13 interview and would essentially practice with them for the lies
14 they were going to tell.

15 THE COURT: And your position is she knew they were
16 false stories.

17 MS. MERMELSTEIN: Of course.

18 THE COURT: Ms. Brady?

19 MS. BRADY: Your Honor, I think the court's point
20 about the allocution is what is important. It did make out the
21 elements of the offense, and she never allocuted to falsely
22 translating; it was rather that she was coaching them.

23 THE COURT: Did she know they were false stories?

24 MS. BRADY: I believe that the allocution indicates
25 that she did believe they were false or at least thought they

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1 may be false.

2 THE COURT: No, I think -- well, you tell me, but I
3 think she allocuted to knowing that they were false stories.

4 MS. BRADY: I think that's right, your Honor, without
5 looking through the transcript.

6 THE COURT: Well, your proposed paragraph 2 is very
7 different than paragraph 2 there. Why don't I alter paragraph
8 2 to say, "It was a part and object of the conspiracy that Wen
9 and others coached asylum applicants to give false stories
10 during interviews." Ms. Brady?

11 MS. BRADY: I am happy with that, your Honor.

12 THE COURT: All right. I will adopt the findings of
13 fact in the presentence report with the following changes. The
14 first one is paragraph 2 strike "lie" and put in place "false
15 stories". What else?

16 MS. BRADY: On paragraph 12, your Honor, my
17 clarification would be Ms. Wen did not create the asylum
18 application but rather provided the asylum applicants questions
19 that would be asked during their asylum hearing.

20 THE COURT: Government?

21 MS. MERMELSTEIN: Your Honor, paragraph 12 describes
22 the scheme generally, not just the conduct of this defendant.
23 It's not the government's position that this defendant created
24 the false application herself, but I think that paragraph 12
25 accurately describes the conduct that was involved.

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1 THE COURT: Yes, I think that's right, because it says
2 "and her coconspirators".

3 MS. BRADY: I am happy with that, your Honor.

4 THE COURT: I'm going to keep 12 the way it is. Next.

5 MS. BRADY: Paragraph 20, Ms. Wen never falsely
6 translated.

7 THE COURT: Do you intend to go through every one of
8 your paragraphs here on this December 30 letter?

9 MS. BRADY: I think so, your Honor.

10 THE COURT: All right.

11 MS. BRADY: And I apologize.

12 THE COURT: Let me look at paragraph 20.

13 Well, this issue is whether or not when she was
14 translating during the interviews a person said X and she
15 translated it as non X. That's the issue.

16 MS. BRADY: That's my understanding.

17 THE COURT: And your position is that she did not do
18 that.

19 MS. BRADY: That's correct.

20 THE COURT: Your position is that if the person said
21 X, even if it was unfavorable, she translated it as X. Is that
22 correct?

23 MS. BRADY: Yes.

24 THE COURT: But you refer to the allocution.
25 Government, what's the government's position?

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1 MS. MERMELSTEIN: Your Honor, we are still in the
2 section governing the scheme generally. It's describing the
3 work of people who did the translating work in the scheme
4 generally.

5 The allegations against this defendant are actually
6 not that she translated in the interviews but that she prepared
7 people for the interviews. So, it's not the government's view
8 that she is even being described by this paragraph. It's not
9 the government's view that she falsely translated answers since
10 she wasn't translating in the interviews.

11 THE COURT: She did not translate in the interviews?

12 MS. MERMELSTEIN: She prepared people for the
13 interviews. She did not accompany them to the interviews to
14 translate for them. So this description --

15 THE COURT: I did not realize that. All right. Why
16 don't I simply add to paragraph 20 that the defendant did not
17 provide translation services during the interviews.
18 Government?

19 MS. MERMELSTEIN: No objection.

20 MS. BRADY: No objection, your Honor.

21 THE COURT: All right. I will add that to paragraph
22 20.

23 21?

24 MS. BRADY: Paragraph 21, Ms. Wen was not paid by law
25 firms or employed by law firms but, rather, she was a

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1 self-employed translator and was paid by her clients, not the
2 law firms. Ms. Wen sold one false one-year letter.

3 THE COURT: Well, I saw that she allocuted to selling
4 one false one-year letter.

5 MS. BRADY: Correct.

6 THE COURT: Government, what's your position on who
7 she worked for?

8 MS. MERMELSTEIN: No objection, your Honor. The
9 government agrees that she was a self-employed contractor.

10 I don't want to interrupt you, but I am happy to jump
11 ahead to the next one, too.

12 THE COURT: Let me just do the change on 21. In place
13 of paragraph 21 I will put "Ms. Wen was a self-employed
14 translator and was paid by her clients, not a law firm. And
15 Ms. Wen sold one false one-year letter." Is that the position
16 of the government, that there was only one false one-year
17 letter?

18 MS. MERMELSTEIN: It is not, your Honor. The
19 government's cooperating witness in this case who purchased the
20 one-year letter that the defendant allocuted to approached the
21 defendant to do so because the witness was already aware that
22 the defendant had sold these letters in the past.

23 It's true that the defendant didn't allocute to the
24 other letters in her allocution, and it certainly wasn't
25 necessary as part of her allocution, but the government does

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1 not believe it was only one. I don't think we need to have a
2 Fatico on the matter. I don't think it affects the
3 government's view of the appropriate sentence in any event.

4 THE COURT: I understand. I'm going to change
5 paragraph 21 to the following: "Ms. Wen was a self-employed
6 translator and was paid by her clients and not a law firm. Ms.
7 Wen allocuted to selling one false one-year letter; the
8 position of the government is that she sold additional false
9 one-year letters."

10 All right. Ms. Brady?

11 MS. BRADY: That's fine, your Honor. On paragraph 41
12 it's a typo. "Wen said that she wasn't happy there because her
13 step grandmother never had any biological children of her own."
14 Any being --

15 THE COURT: Oh, right. Paragraph 41 the word "ay" is
16 being changed to "any".

17 MS. BRADY: Correct.

18 THE COURT: Next.

19 MS. BRADY: Paragraph --

20 THE COURT: Let me look. I see 49. One moment.

21 In paragraph 49, in the third line, the word Wang,
22 W-a-n-g, should be changed to Yang, Y-a-n-g.

23 On paragraph 50 does the government have any reason to
24 doubt the new figure that the defendant is proposing, that is,
25 8800 rather than 8000?

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1 MS. MERMELSTEIN: We do not. And I should note we
2 have no objections to the remainder of the factual corrections.

3 THE COURT: All right. Thank you.

4 Paragraph 50, I'm going to change the amount 8000 to
5 the amount 8800.

6 Paragraph 51, I'm going to change to "Ms. Wen was
7 never married to her biological son's father. She married
8 Ming Zheng Zeng January 1996, and the couple divorced in 2002."

9 Paragraph 54, change the name Dr. Lawrence Quan to Dr.
10 Nicholas Guan.

11 The last sentence, add the words at the end of that
12 sentence "and daily life".

13 Paragraph 55, the first line, change the single word
14 "a psychiatrist" to the plural "psychiatrists". And in the
15 last line where it says Mount Sinai Hospital add the phrase "in
16 2003".

17 Paragraph 58, change 1994 to 1996.

18 Paragraph 61, in paragraph 61 change the second
19 sentence to read as follows: "She worked as a translator for
20 individuals who were applying for various benefits, such as
21 housing, Social Security, medical and immigration status,
22 including some asylum applications, and earned approximately
23 \$1800 per month." That's the change in sentence two at
24 paragraph 61.

25 Change paragraph 63 to read as follows: "Ms. Wen

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1 presently has no bank accounts. She has an IRA account and
2 other investments worth approximately \$60,000. As much as she
3 can, Ms. Wen provides financial support to her parents who are
4 elderly and have health issues.

5 All right. I adopt the findings of fact in the
6 presentence report with those specific changes. I will return
7 all of this information to the probation department. That
8 helps with some of my questions, but let me get a better fix on
9 exactly what this defendant did.

10 All right. I think I have it. Looking at my notes
11 and hearing what the parties have said, what she would do is
12 she was given the stories, and she knew them to be false but
13 helped the people prepare for their interviews with the
14 Department of Homeland Security and helped them provide answers
15 that were consistent with what she knew to be a false story.
16 Essentially is that the government's position?

17 MS. MERMELSTEIN: Two clarifications, I suppose. The
18 interview is actually with the Office of Citizenship and
19 Immigration Services, not the Department of Homeland Security.

20 THE COURT: That's a subdivision of the Department of
21 Homeland Security. Go ahead.

22 MS. MERMELSTEIN: This defendant is right that she had
23 her own company. That company is what is known in sort of
24 colloquial terms as a travel company. So, she wasn't just
25 given someone's story and helping them prepare. Clients would

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1 come to her as their first stop in seeking asylum, and she
2 would help them with all of the paperwork, and indeed she would
3 then find the lawyer who would actually be the one signing the
4 application. So, I think her sentencing submission tries to --

5 THE COURT: She would find the lawyer who what?

6 MS. MERMELSTEIN: Who would then submit the asylum
7 application. So the asylum application has a certification
8 from the lawyer on the front. The clients came first to this
9 defendant, and then this defendant, having helped them prepare
10 all the paperwork, helped them find the lawyer to make the
11 submission on their behalf.

12 THE COURT: So at what point was the false story
13 devised?

14 MS. MERMELSTEIN: It was written by others working
15 with the defendant in the travel company.

16 THE COURT: In her company?

17 MS. MERMELSTEIN: Correct.

18 THE COURT: So, is it the government's position
19 that -- and she owned this company?

20 MS. MERMELSTEIN: That's correct.

21 THE COURT: So that it was her company, others in her
22 company who developed the false story?

23 MS. MERMELSTEIN: That is the government's position,
24 yes.

25 THE COURT: Ms. Brady, what is the defense's position?

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1 MS. BRADY: Your Honor, that is not my understanding
2 of what happened. Ms. Wen did employ certain paralegals, and
3 they assisted with this questioning process and coaching
4 process but did not prepare the stories. However, in some
5 instances other successful asylum applications were provided to
6 the new incoming applicants as examples of what one could say.
7 Does that make sense?

8 THE COURT: In other words, here, this was a
9 successful story, you know what to do with it. Right?

10 MS. BRADY: Well, maybe not that directly, but this is
11 a successful story, you have to prepare your own story.

12 THE COURT: Well, that does put a different light on
13 it. I thought really she was just a hired translator.

14 MS. BRADY: I mean that was not in every instance,
15 your Honor.

16 THE COURT: It doesn't have to be.

17 MS. BRADY: No.

18 THE COURT: Let me look at a few things in the
19 allocution.

20 MS. BRADY: Sure.

21 THE COURT: What's the position of the defense on the
22 false one-year letter? As I understand it, based on these
23 papers, to be successful in an asylum application you have to
24 have been in the United States for less than one year. And she
25 was paid \$500 to sign somebody else's name to a false one-year

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1 letter that was given to her that she knew to be false? In
2 other words, the letter said I know Mr. X, and I know that he
3 has been in the United States for less than one year because A,
4 B, C. And she was given this letter she says by the government
5 agent -- I take it that's the cooperating witness --

6 MS. BRADY: Correct.

7 THE COURT: And she knew it was false. Presumably she
8 knew who Mr. X was and that he has been in the United States
9 for more than one year. But she accepted \$500 and signed it
10 not Xia Ping Wen but with somebody else's name. Is that what
11 happened?

12 MS. BRADY: Yes, your Honor.

13 THE COURT: Does your client agree with that?

14 MS. BRADY: Your Honor, essentially that is correct,
15 and she does admit to that.

16 THE COURT: All right. All right. I think I have a
17 better sense of what this defendant did. I want to hear from
18 the defense attorney as to whatever you want to tell me; then I
19 want to hear from the government; then I will hear from the
20 defendant herself.

21 MS. BRADY: Your Honor, I will rely on my submission
22 but briefly just highlight a few points.

23 THE COURT: Yes, ma'am.

24 MS. BRADY: Ms. Wen, as the court knows, is 50 years
25 old; she has no criminal history whatsoever.

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1 THE COURT: None whatsoever.

2 MS. BRADY: None. And I believe that her statement in
3 the sentencing submission, and my experience with her over
4 these several months, I believe her remorse is significant and
5 genuine.

6 THE COURT: I think it is also based on certainly
7 these letters. She certainly has extensive community support
8 as well from a wide range of people.

9 MS. BRADY: And I'm asking the court to impose a
10 sentence of probation. And my major concerns are that if she
11 were to be sent to jail she would be not only missing out on
12 her psychiatric counseling and treatment -- which she goes to
13 weekly, and she takes several medications -- but that simply
14 would not happen in the best of facilities in BOP.

15 The other concern is that she does have this \$8800
16 that she needs to contribute to her son's tuition and
17 incidental expenses while he is at Cornell. He is here in the
18 courtroom because he is on holiday break right now.

19 THE COURT: Welcome. He is quite a success story, and
20 that shows that she is a good mother -- a very good mother,
21 apparently -- and her son seems to be quite successful in
22 American society. That's all to the good. And it's important,
23 young man, that you stay in school, finish. I am sure you
24 realize that. Go ahead.

25 MS. BRADY: Your Honor, I guess the last point that I

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1 did make in both the objections to the PSR and also in my
2 sentencing submission, is I find it very difficult to reconcile
3 the fact that the same probation is recommending different
4 things for different defendants with the same offense level.

5 In the John Wang case --

6 THE COURT: Well, because one presumes the history and
7 circumstances of the individual and the crime are different.
8 And, indeed, 18 U.S.C. 3553 mandates that the court take into
9 account the history and characteristics of the crime and the
10 individual, along with all the other factors in 18 U.S.C.
11 3553(a).

12 I saw that you pointed out two people that Judge
13 Patterson had sentenced to probation, and he also has sentenced
14 people to incarceration. What are you telling me about the
15 people he sentenced? I am not so much concerned about the
16 exact same crime, although obviously that's important, but we
17 need to know the circumstances of that crime and of the
18 individual, that individual's criminal record, if any, and
19 again all of the factors in 3553(a).

20 MS. BRADY: My understanding, your Honor, is that the
21 four defendants in the John Wang case, the probation office
22 recommended probation, and in at least two of those defendants
23 their offense level was the same as Ms. Wen's, 14.

24 THE COURT: Yes. But actually what you have just done
25 is distinguish those individuals from this individual, because

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1 you have said that the probation department there recommended
2 probation, and the probation department here, I believe -- I
3 can check -- agrees with the government's recommendation.

4 MS. BRADY: That's correct.

5 THE COURT: So you have actually now distinguished
6 this case from that case.

7 MS. BRADY: I take that point, your Honor, but I
8 believe that no translator has been sentenced to incarceratory
9 time.

10 THE COURT: She seems to be more than a translator. I
11 thought she was a translator, but at least according to the
12 government now this seemed to be a full service operation which
13 she owned, and she had paralegals working under her. And I
14 have seen a number of cases on East Broadway where people would
15 literally come into the office, and the heads of the office
16 would have file drawers with different stories, one that they
17 belonged to a house church and were persecuted, and the
18 subsection of that was that they were followers of Falun Gong
19 and were persecuted for that, hounded, and had a risk of
20 persecution. Another set said that they had been forced to
21 have an abortion. And another set of proposed stories said
22 that they were being persecuted for their political opposition
23 to the Chinese regime. And the people are supposed to choose
24 one or the other and memorize them. It sounds like she is
25 closer to that than to being a simple translator.

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1 Certainly if she owned the place, and if the
2 paralegals are supplying these proposed stories --

3 MS. BRADY: Your Honor, may I --

4 THE COURT: -- that's different from being a
5 translator. Go ahead, take your time.

6 MS. BRADY: Ms. Wen employed one full-time and one
7 part-time paralegal at any given time. I mean that was the
8 extent of the operation.

9 THE COURT: And did the one full-time and one
10 part-time paralegal have scripts that they would provide to
11 these people?

12 MS. BRADY: Your Honor, it is my understanding that
13 there are actually translators that were working for Ms. Wen
14 and that they would translate but also provide these questions.

15 THE COURT: I'm saying this as a declarative statement
16 but I'm asking it as a question really. Not questions that
17 were going to be asked based on the true history of the
18 applicant but, rather, a story for the applicant to tell that
19 the defendant knew was false. Is that right?

20 MS. BRADY: Yes.

21 THE COURT: All right. Thank you.

22 Is there anything else you wanted to say?

23 MS. MERMELSTEIN: No, your Honor.

24 MS. BRADY: Your Honor, as I say, I believe that the
25 cases that the government cited for incarceration time were all

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1 lawyers. There was one non-lawyer.

2 THE COURT: Also, in my experience, normally the heads
3 of these mills are attorneys --

4 MS. BRADY: Correct.

5 THE COURT: -- and to that extent, you know, their
6 punishment should be appropriate.

7 MS. BRADY: They are held to a higher standard, yes.

8 THE COURT: That's a better way of phrasing it.

9 MS. BRADY: No, your Honor, I would rely on our
10 submission.

11 THE COURT: Government, things are changing here.
12 What's the position of the government?

13 MS. MERMELSTEIN: Your Honor, the government feels
14 strongly that a guideline sentence is appropriate in this case.
15 To make one --

16 THE COURT: No, I think a guideline sentence is too
17 high. That's my current thinking. The issue in my mind is
18 whether incarceration is appropriate or not. But I didn't mean
19 to cut you off.

20 MS. MERMELSTEIN: That's fine, your Honor.

21 First, I think it's actually -- based on the span of
22 cases that were all part of the same take-down in this case,
23 that as your Honor knows are before multiple judges -- it's not
24 the case that the person running the mills is sort of typically
25 a lawyer. In many of the cases the person running the mill is

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1 not a lawyer, and they are either paying to use the name of a
2 real lawyer, or they are sort of employing a real lawyer for
3 the need for the bar ID number.

4 THE COURT: But is that the level that this defendant
5 is at?

6 MS. MERMELSTEIN: No, we're not suggesting that she is
7 equal to the people who are running sort of huge mills, but I
8 think she has also mischaracterized the level of her
9 involvement. And although I don't in any way doubt that she is
10 very sorry now, in her letter to the court she talks about how
11 she can easily be tricked and misled, and that sort of it was
12 out of a desire only to be helpful to people, and I think
13 that's not accurate. This wasn't sort of an inadvertent
14 mistake into which the defendant fell where she ended up
15 helping someone. This was a routine part of the business and a
16 way to make money.

17 And this wasn't sort of a secretive business. It's no
18 great news to anyone involved here that there is massive asylum
19 fraud and it unfortunately can be relatively easy to accomplish
20 with certain stories through people who have in fact had these
21 experiences and have relayed them have a ring of truth. So, I
22 think the defendant's characterization of her role and her
23 culpability is really minimizing what her responsibility was
24 here, because she was the person to whom these applicants were
25 coming.

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1 So, first, I think the nature of her own
2 involvement --

3 THE COURT: I had thought she was hired by a law firm
4 to be a translator.

5 MS. MERMELSTEIN: The opposite in fact.

6 THE COURT: Yes.

7 MS. MERMELSTEIN: So, second of all, to talk
8 briefly -- although I don't think this seemed to be a point
9 that was of great interest to your Honor --

10 THE COURT: I'm sorry. Say that again.

11 MS. MERMELSTEIN: Just to address briefly Judge
12 Patterson's sentences -- although your Honor seemed to
13 recognize that all defendants are different and it's hard to
14 compare apples and oranges -- but first I should say that the
15 government felt strongly that those probationary sentences were
16 not sufficient. Obviously, Judge Patterson disagreed.

17 But I think that what can be seen in all of these
18 related cases that are now pending is that asylum fraud is just
19 a huge problem. It is much too easy for people to come in and
20 take advantage of the stories that have the ring of truth and
21 to bog down the system, to force asylum officers to make
22 judgment calls about who is lying. And there has to be some
23 general deterrence here, I think more than in some other cases.
24 Where everyone knows drugs are illegal, I don't think it's any
25 great surprise that if you sell large quantities of drugs, you

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1 might go to jail. But here there is almost a cavalier attitude
2 about the lies and about the fact that there is sort of no
3 victim of asylum fraud.

4 THE COURT: You mean in the case of this defendant you
5 think she is being cavalier?

6 MS. MERMELSTEIN: I don't think this defendant is
7 being cavalier. I am saying that looking at the way in which
8 these kinds of mills operate, that applicant after applicant
9 after applicant is being told here is one that worked, you
10 draft it, you come back, no, no, here is some details that
11 would be better, that there is not a sufficient recognition of
12 the cost to the system, of the cost to the idea of asylum, the
13 idea to the actual people who are eligible for asylum. So I
14 think in this case, as in all of these cases, there is a real
15 need for general deterrence, there is a real need to send a
16 message.

17 THE COURT: I agree with you, I don't think this is an
18 issue of individual deterrence; I don't think this defendant
19 will ever do this again. The issue is general deterrence, I
20 agree with that. But how to effectuate that goal is what we're
21 talking about, as well as punishment. Go ahead.

22 MS. MERMELSTEIN: No, I think your Honor is exactly
23 right, that's the question. And I think probationary terms
24 don't accomplish that. I think that the message that has been
25 received, that we're seeing as other defendants communicate

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1 with the government about cases that are still pending, is that
2 the probationary term is not a deterrent, it's not seen as
3 being taken seriously as a serious crime, and I don't think it
4 will serve as a deterrent.

5 This is a case -- not this defendant's case in
6 particular -- but the take-down by the government of these
7 cases has received some real press attention in the Mandarin
8 language newspapers in New York.

9 THE COURT: Well, several of the letters say that the
10 letter writer was scanning the Internet and was surprised to
11 see that this defendant was involved because they never
12 imagined she would be involved in it. Doesn't that go to
13 general deterrence?

14 MS. MERMELSTEIN: I don't think so, your Honor. I
15 don't think it's sufficient that people learn that somebody who
16 did it has been arrested. There has to be a significant
17 punishment. There has to be a punishment that says that the
18 government takes this seriously, and that it is a serious
19 crime, that it's not going to be treated as sort of a minor
20 transgression. So, I think an incarceratory term is absolutely
21 necessary.

22 And it's been clear in the government's dealings with
23 other defendants that the general view of the probationary
24 terms has been that that's sort of the big win and that they
25 can sort of move on without thinking about it. And I think

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1 that's a big problem because there are massive, massive numbers
2 of asylum applications. There are thousands and thousands of
3 applications filed every year in New York alone, and I think
4 this is really representative of sort of how prevalent the
5 fraud is.

6 80 and 90 percent of applications are rejected by
7 asylum officers in that first round interview in large part
8 because they are deemed to be fraudulent. There are also cases
9 where someone is honest about a fact that makes them ineligible
10 are for asylum, but vastly more because of fraud. This is a
11 massive problem, and the need for the word to be out that it
12 cannot continue is really significant.

13 In addition, I think this defendant, because of the
14 nature of her involvement, I think the just punishment includes
15 an incarceratory term. So, I don't want to belabor the point,
16 but I think for those reasons a guideline sentence is
17 appropriate.

18 THE COURT: Well, you mentioned several times the
19 other cases in what you characterize the as the take-down. I
20 am not sure I am aware of what other cases there are in what
21 you call the take-down, so talk to me. Is the government going
22 after the lawyers who are the heads of these things, or the
23 owners who are not lawyers of massive mills? There is no
24 indication here that this was a massive mill. I mean it is
25 illegal, but it doesn't sound like a massive operation. So,

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1 what is involved in what you have said are other cases?

2 MS. MERMELSTEIN: There are a number of cases pending
3 before Judge Patterson. There is a case scheduled for trial on
4 February 3 before Judge Marrero of an attorney, his name is Ken
5 Giles. I don't know that I can get all the indictment numbers
6 matched correctly, but I believe that's 12 Cr. 935. There is a
7 nine defendant case going to trial before Judge Abrams in
8 March. That is a significant mill not run by lawyers, although
9 lawyers were connected to and employed by the firms in order to
10 enable the work. That particular case, those are two related
11 mills.

12 In any event, the government arrested 30 defendants as
13 a result of a wide-spanning asylum fraud investigation at
14 multiple different firms, and because it wasn't one conspiracy,
15 just the same sort of crime, those people were charged in
16 multiple indictments.

17 THE COURT: Those people were charged --

18 MS. MERMELSTEIN: -- in multiple indictments. It's
19 not the government's contention that this defendant was at the
20 top of one of the biggest mills. Those people are facing
21 guidelines, for example, in the range of 70 months. So she is
22 not situated like them, as I think the plea agreement
23 indicates, and that's not the government's position. But it's
24 also not the government's view that she is at the bottom.

25 THE COURT: How did you come up with 25 to 99

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1 documents?

2 MS. MERMELSTEIN: I apologize, your Honor. One
3 moment. The government's evidence indicated how many total
4 asylum applications this defendant was involved in submitting,
5 and in assessing what evidence would prove sort of how many of
6 those were clearly fraudulent, that was the government's view
7 of what it could prove at trial.

8 THE COURT: Talk to me about the two defendants -- if
9 you know who they are -- referenced by Ms. Brady.

10 MS. MERMELSTEIN: The defendants before Judge
11 Patterson?

12 THE COURT: Yes, that's who she referenced. And she
13 references them in her defense submission as well.

14 MS. MERMELSTEIN: I apologize, your Honor. Obviously
15 there are multiple AUSAs on the multiple cases, but my
16 understanding of those defendants is that they were
17 paralegal -- Liana Chen was an interpreter, and the other two
18 were paralegals, and the fourth was a lawyer. Judge Patterson
19 I recall in at least one of those sentencings placed great
20 weight it appeared on the relative unsophistication of the
21 defendant as a person. The defendant had an elementary school
22 education, I think did not read or write in any language, and
23 Judge Patterson opined that he thought it was possible that
24 there had been some misunderstanding that drove things,
25 notwithstanding obviously that the defendant was legally

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1 guilty. But it wasn't the full scope of intent that you might
2 expect, and his relative unsophistication, his lack of English
3 language abilities, might have led to his participation in the
4 crime.

5 I can't sort of standing here give you all the details
6 of all of the defendants, but I think that they are not wildly
7 dissimilarly situated from this defendant. This defendant I
8 think had employees of her own; she was the first stop for
9 people. I think she is fairly characterized as being more
10 culpable than them. But I also think that, you know, there are
11 more culpable defendants than her. She is sort of roughly in
12 the middle, I would say.

13 THE COURT: Thank you.

14 Ms. Wen, the Federal Rules of Criminal Procedure give
15 you the right to address me. You don't have to say anything.
16 You have the right not to say anything. But if you want to
17 address me, as I say, you certainly have the right. Now is the
18 time if you want to tell me anything.

19 THE DEFENDANT: Honorable Judge, I believe you have
20 read my statement submitted to you, and I am deeply apologetic
21 and very sorry for my words and my behavior.

22 During this year after I have been arrested, I have
23 suffered both psychologically and physically, and I have paid a
24 great price myself.

25 I'm a 50 year old woman who should not have ended up

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1 in this situation. Especially I should not have let my son see
2 me in this type of situation. If I had known back then this is
3 what would happen, absolutely I would not make this choice, I
4 would not do this.

5 After I reflected on myself, and I took time to
6 reflect and think of my own mistake, I feel deeply sorry and
7 repent for my mistake, and I plead for your Honor's leniency.

8 I promise I will be a better person. I have
9 confidence in myself because I know deep down I'm a good
10 person. I have the ability to criticize myself and to correct
11 myself.

12 I did not know what I have done was so wrong before,
13 and I have confidence in my friends and relatives. I do
14 believe they will continue to support me, to make me to be a
15 better person, and to correct me if I make mistakes, to turn a
16 bad thing into something beneficial.

17 If your Honor and the government are willing to give
18 me an opportunity to forgive me, I'm willing to spend the rest
19 of my life to do good deeds, to serve the community and to
20 serve society.

21 I want to point out one fact. At the time I pleaded
22 guilty to the amount of documents that were submitted for
23 application, the number 25 to 99 is the total number during the
24 entire five years I helped those people submit it, and I do not
25 know how many of those were fraudulent.

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1 So, I want to make my apology to your Honor and to the
2 government one more time.

3 THE COURT: All right. Thank you very much. I didn't
4 mean to cut you off, Ms. Wen. If you have anything more to
5 say, you can; but I assumed you were finished.

6 THE DEFENDANT: No more. So help me God.

7 THE COURT: All right, thank you. I want to look
8 something up.

9 Ms. Wen, I do believe that you are extremely
10 remorseful. I believe you regret very much what you did. You
11 have a tremendous community support, as set forth in these
12 letters and by the fact that so many people are here today to
13 support you. You can rely on that in the future. You
14 obviously devoted a great deal of attention and effort to
15 raising a son who seems to be very successful. All of that is
16 to the good.

17 I am concerned, however, about what is known as
18 general deterrence. I don't think that individual deterrence
19 is a substantial issue in this sentencing, because I don't
20 think you ever are going to commit this crime again, but
21 general deterrence is very important, especially in the area of
22 immigration fraud.

23 You knew the stories were false. You have allocuted
24 to that. You were not simply a translator who translated
25 documents, and you played a not insignificant role in

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1 conspiring to commit immigration fraud.

2 In part for punishment but also in large part for
3 general deterrence -- so that others know not to follow in the
4 path you have followed -- I do believe some incarceration is
5 appropriate. I am not going to sentence you to the guideline
6 range, because I think that is too high, especially given the
7 apparent uncertainty of the number of documents that were false
8 and that you knew was false, because there is a technical point
9 that there is an increase of six levels due to the allocution
10 to 25 to 99 documents. The levels fall off if the documents
11 were fewer. And I also don't think the bottom of the guideline
12 of 15 months is appropriate. I think it's greater than
13 necessary to meet the ends of the criminal justice system. But
14 it is also appropriate that there be some incarceration here.

15 My intention is to sentence you to three months'
16 incarceration, to be followed by one year of supervised
17 release, with the conditions set forth in the probation
18 department report; and I will set those forth in a minute. And
19 I do believe that that is an appropriate sentence.

20 I will hear argument from both sides, but my current
21 intention is not to require you to be remanded now, and that
22 you will be able to surrender at a later point. That's my
23 intention.

24 Are there any formal objections by the defense or by
25 the government before I formally impose sentence?

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1 MS. BRADY: No, your Honor. And I was intending to --
2 excuse me, your Honor.

3 THE COURT: Yes.

4 MS. BRADY: Your Honor, I had intended to ask the
5 court if you were going to impose an incarceratory sentence, to
6 let her surrender at a later date.

7 THE COURT: That's my intention. As I said, I will
8 hear argument. The government may have a position after. Do
9 you?

10 MS. MERMELSTEIN: Your Honor, we have no objection to
11 sentence and no objection to your Honor setting a surrender
12 date.

13 THE COURT: OK, no legal objection has been set forth
14 by either side. I now will impose sentence.

15 I hereby find that the offense level is 14, the
16 Criminal History Category is I. The guideline range is 15 to
17 21 months.

18 Pursuant to the Sentencing Reform Act of 1984, it is
19 the judgment of this court that the defendant Xia Ping Wen is
20 hereby committed to the custody of the Bureau of Prisons to be
21 imprisoned for a term of three months.

22 Upon release from imprisonment, Ms. Wen shall be
23 placed on supervised release for a term of one year, with the
24 conditions recommended by the probation department, namely the
25 following mandatory conditions: Ms. Wen shall not commit

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1 another federal, state or local crime; she shall not illegally
2 possess a controlled substance; she shall not possess a firearm
3 or dangerous weapon or destructive device; she shall refrain
4 from any unlawful use of a controlled substance. I hereby find
5 that Ms. Wen is highly unlikely to abuse drugs or any
6 controlled substance and, therefore, I am waiving the mandatory
7 drug testing requirement.

8 Ms. Wen shall cooperate in the collection of DNA as
9 directed by a probation officer. During the period of one year
10 of supervised release she shall comply with standard conditions
11 1 through 13, plus the following special conditions: She shall
12 participate in a mental health program approved by the
13 probation office; she shall continue to take any prescribed
14 medications unless otherwise instructed by her healthcare
15 provider; she shall contribute to the costs of services
16 rendered not covered by third-party payment, based on her
17 ability to pay and the availability of third-party payment. I
18 hereby authorize the release of available psychological and
19 psychiatric evaluations and reports to the relevant healthcare
20 providers.

21 Within 72 hours of release from the custody of Bureau
22 of Prisons, Ms. Wen shall report in person to the probation
23 office in the district to which she is released. I am not
24 imposing a fine because I find Ms. Wen lacks the ability to pay
25 a fine, after taking into account the presentence report and

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1 her lack of assets, her modest income and her family's
2 responsibilities. I am also not imposing restitution, because
3 I find that there is no victim within the parameters of 18
4 U.S.C. 3663.

5 I hereby order Ms. Wen to pay to the United States a
6 special assessment of \$100, which is due immediately.

7 I have sentenced the defendant with all of the factors
8 in 18 United States Code, Section 3553 in mind. I have
9 sentenced her below the guideline range. I understand my
10 authority under the Booker and Fanfan cases, and I believe the
11 sentence is sufficient but not greater than necessary to meet
12 the ends of the criminal justice system.

13 The reasons why I have varied below the guideline
14 range under Booker and Fanfan is primarily because I believe
15 the defendant is genuinely remorseful, I believe there is
16 essentially no risk of recidivism, and because of the wide
17 range and deep community support shown on behalf of this
18 defendant.

19 Ms. Wen shall surrender to the institution designated
20 by the Bureau of Prisons on or before 2 p.m. on February 28,
21 2014.

22 MS. BRADY: Is there any way we could have another
23 month, your Honor?

24 THE COURT: Just a moment. Is the government seeking
25 forfeiture? I take it not.

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1 MS. MERMELSTEIN: No, your Honor.

2 THE COURT: All right. The reason for the month?

3 MS. BRADY: Your Honor, she does have a number of
4 things to get in order, her apartment, her finances, and her --

5 THE COURT: I have no objection to that. The
6 surrender date will be March 28, on or before 2 p.m.

7 Ms. Brady, are you aware of any legal reason why the
8 sentence should not be imposed as I have stated it?

9 MS. BRADY: No, your Honor.

10 THE COURT: Ms. Mermelstein?

11 MS. MERMELSTEIN: No, your Honor.

12 THE COURT: I hereby order the sentence to be imposed
13 as I have stated it.

14 Is there a limited waiver of appeal rights here?

15 MS. MERMELSTEIN: Your Honor, I believe there is,
16 although I confess I'm not certain. I assume there is.

17 MS. BRADY: I think that's right.

18 THE COURT: What do you think is right? Is there a
19 waiver of rights in the plea agreement?

20 MS. BRADY: I believe there is. I don't know if I
21 have it with me either.

22 THE COURT: Well, I'm going to take a look at it. I
23 don't want to give her advice that's inaccurate. I'm going to
24 take a look for it. Normally I don't keep those.

25 MS. BRADY: Your Honor, Ms. Wen says that she did give

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1 up the right to appeal.

2 THE COURT: All right. My records do not have it;
3 they normally don't. I return those to the prosecutors.

4 Ms. Wen, you have the right to appeal the sentence I
5 just imposed on you. If you cannot pay the cost of an appeal,
6 you have the right to apply for leave to appeal in forma
7 pauperis.

8 I do wish to inform you -- which you apparently
9 already know -- that in your plea agreement you agreed to waive
10 your right to appeal, and you agreed to waive your right to
11 collaterally attack the sentence I imposed if I impose a
12 sentence that is 21 months or below. And I certainly have done
13 that, because I sentenced you to three months' incarceration.

14 If you request, the clerk of the court will prepare
15 and file a notice of appeal on your behalf immediately. Do you
16 understand your appeal rights?

17 THE DEFENDANT: Yes.

18 THE COURT: The government, I take it there are no
19 open counts?

20 MS. MERMELSTEIN: No, your Honor.

21 THE COURT: All right. Ms. Wen, I have sentenced you,
22 as I say, largely because of the concern of general deterrence,
23 that is, that others not do what you did, that others
24 understand that you cannot assist people in illegally obtaining
25 asylum here in the United States. You weren't simply a

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1 translator; you had a larger role. You have a lot of skills,
2 obviously. You have been trained scientifically. You do have
3 skills as a translator. It sounds like you also have
4 managerial and supervisory skills. When you get out of prison,
5 please, make sure you use those skills in legal ways.

6 You have a great deal to contribute to your community;
7 just do it legally. Make sure I don't see you again.

8 And I want to address Mr. Wen, Ms. Wen's son, for a
9 moment. Mr. Wen, your mother is not a bad person by any
10 stretch of the imagination. I am sure you understand that.
11 She has scores of letters of all the good things she has done.
12 She did something, however, that's illegal. She did something
13 that was wrong, but she has devoted a great deal of her life to
14 raising you correctly with the right standards and the right
15 values, and it sounds like you are well on the way to becoming
16 a responsible adult. Don't let this change your view of your
17 mother. She is going to need your support over the next six
18 months. She is out for a couple of months, and she will be in
19 for three months. Make sure you give it to her. OK? She is
20 not a bad person. It's important that you stay in school and
21 graduate. Do you understand that?

22 MR. WEN: Yes.

23 THE COURT: All right. Thank you very much.

24 * * *